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Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

Cheryl E. Hill,

Petitioner,

V.

Fort Bend Independent School District,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari

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7 cpp

QUESTIONS PRESENTED

1. Whether in holding that the record contained insufficient evidence to sustain the jury's verdict, the courts below misapplied the standard of review dictated disregarding and excluding evidence in the light most favorable to the nonmoving party supporting the employee's prima facie case on all claims (race, age, retaliation and hostile working environment via harassing, disparate treatment) and undermining employer's nondiscriminatory explanation.
2. Whether the courts below abused their discretion by ignoring the employee's violation of Federal Rule of Civil Procedure 37 which impeded/undermined the employee's opportunity to produce the comparative to show the gross disparity between her qualifications and those persons promoted over her.
3. Whether the courts below applied a standard too ridged and inappropriate to determine that the occurrence of a Title VII violation continuing into the charge filing period remain actionable; when viewed in context of the totality of the employee's with the employer, it is apparent that they are note discrete or isolated, but part of a series or pattern of discrimination.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Cheryl E. Hill, Plaintiff – Appellant

Fort Bend Independent School District, Defendant – Appellee

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. Because the Petitioner was denied the opportunity for her case to be taken to the jury on her Title VII claims.

OPINIONS BELOW

The opinion of the United States Court of Appeals Appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court appears at Appendix B to the petition and is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 26, 2001. A timely petition for rehearing was denied by the United States Court of Appeals on October 31, 2001.
This jurisdiction of this Court is invoked under 28 U.S.C. S 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The United States Constitution provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws." U.S. Const. Amend..XIV, S.1.

STATEMENTS OF THE CASE

Cheryl Elizabeth Hill, an African American female, began her teaching career in 1970 with a Bachelor of Science degree in Elementary Education with a concentration in History from the District of Columbia Teachers College, now known as the University of the D.C. in Washington, D.C. She obtained a Master of Arts degree in Education with a concentration in Early Childhood from the University of Texas in 1976; she alleges in this law suit that, since 1988, the Fort Bend Ind. Sch. Dist., refused/failed to promote her; other claims included in her discrimination lawsuit are retaliation, harassing-hostile working environment via disparate treatment and the petitioner raised the embedded issue of gender generated by the respondent's initial response statement to the EEOC and inference embodied within the respondent's projected nondiscriminatory explanation as to why the respondent failed/refused to promote the petitioner. After completing her administrative credentials/certification (post-graduate degree course work equating almost a second Master's Degree at Prairie View A & M University in 1988; she submitted coursework and passing test results to the Texas Education Agency); the petitioner began applying for administrative positions in the Fort Bend Ind. Sch. Dist. in 1988. In 1989, the petitioner accepted a teaching position with the Fort Bend Ind. Sch. Dist. In hopes of increasing her chances for promotional opportunity.

The petitioner continued to apply for administrative position; but, she was still continuously denied the opportunity for promotional advancement prior to 1998, and, after, she attempted to seek answers through internal redress via verbal and written inquiries as to "why" she was continuing to be overlooked for promotional opportunities while others

who were less experienced, less qualified, holding less credentials were promoted over her. Fort Bend's verbal reply to the petitioner's verbal inquiries were meet with some verbal variance that did not equate a legitimate response congruent to really hiring the best applicant and most qualified for the position. The written inquiries whereby she tried to seek answers through internal redress for the petitioner were never granted/responded to by the Fort Bent Ind. Sch. Dist.; the petitioner found herself in a precarious situation, in trying to discern, is she was, indeed, a victim of discrimination in the earlier stages of her denied promotional opportunity; even though, the persons promoted over her were mostly White, but there were in some instances a few splattering of Blacks who were known to "Amy Coleman" and who were given the nod of approval by, the, Black Human Resource Director, Amy Coleman, to Fort Bend's **all White** ultimate decision makers in the Fort Bend Ind. Sch. Dist.

Moreover, Fort Bend Ind. Sch. Dist. Had become astute and adept in concealing discrimination and, on paper, Fort Bend Ind. Sch. Could make it appear and give persuasive statistics that Fort Bend Ind. Sch. Were promoting Blacks into administrative positions comparable to Whites, but what the statistics failed to disclose is that the Blacks being promoted in Fort Bend Ind. Sch. Dist. Were concentrated in black schools/geographical areas in Fort Bend Ind. Sch. Dist. The Fort Bend Ind. Sch. Dist.'s practice of au ju segregation impacted this disparate impact, but in paper, it is difficult to discern. The petitioner had foreshadowed this concern with the courts below in explaining her reluctance to go forward with an EEOC complaint due to the fact that she was aware that Fort Bend Sch. Dist. Ahd cultivated the art of concealing discrimination to a fine tooth science and offering up statistics based upon segregated data of Black schools rather than

holistic data which belied the truth. The Blacks schools are concentrated in area 1 and the White schools are concentrated in areas 2 and 3 of the Fort Bend Ind. Sch. Dist. The majority of the Blacks promoted are cluster/concentrated in one area which leaves the other two areas almost completely White. The petitioner created maps/**charts** displaying this disparate impact, but the courts below ignored and excluded this direct information available in the record. The record contains a direct statement in the petitioner's affidavit quoted from Amy Coleman signaling the truth of the matter concerning promotions of Blacks—On one of those occasions when the petitioner questioned why she had not gotten an assistant principal's position in what happened to be at one of the schools in the White areas. Mrs. Amy Coleman said, "Cheryl, these White folks are not going to hire you in these White schools." The petitioner's opportunity for promotional opportunity continued to be denied and further suppressed by another discriminatory pattern and practice which emerged around 1995 called the "Cohort Classes" controlled and headed by Fort Bend Ind. Sch. Dist.'s Superintendent, Don Hooper, White, and Betty Baitland, also white, both taught and mentored their majority young and White students who were beginning graduate study and working toward their Masters at the University of Houston; the students in these Fort Bend's Superintendent classes were being prepared as a pool of applicants in which to pull from as administrative positions became available, in other words, they were already pre-destined for promotional positions/opportunity in the Fort Bend Ind. Sch. Dist.

Around 1995 or 1996, the petitioner was told via direct statement by her former Black principal, Raymond Whitley that a "blank reference form" was in her personnel file which was sent in 1994, by another former principal of the petitioner who happened to be White, Dianne McDonald.

Raymond Whitley warned the petitioner that as long as the blank reference form remained in her file; it would continue to give a "negative" silent coded message. Mr. Whitley also made direct statements to the petitioner concerning the fact that he was sharing this with the petitioner in strictest confidence and sticking his neck out because the staff attorney Bernadette Gonzales for Fort Bend Ind. Sch. Dist. Made person who sat on applicant screening and/or hiring committees sign affidavits that they would not discuss what had transpired in making their decisions about the screening and hiring of applicants. Such a practice seems suspicious and seems not to reflect an open and honest practice. Mr. Whitley had been on a screening committee for vacancies for assistant principals in 1994, and he said the persons on the committee were very impressed with the petitioner's qualifications and credentials, but the "blank reference form" sent in by Dianne McDonald made the committee decide not to grant the petitioner an interview. Mr. Whitley tried to convince them to interview the petitioner, but they remained steadfast because they had all been schooled on the meaning of the "blank reference form" as told to the petitioner by Raymond Whitley. Dr. James Rueter, a former Superintendent for Elementary schools, advised administrators how **not** to write down anything negative to avoid legal repercussions; he advised administrators, "When you do not want to give an applicant a good reference, send the reference in blank and a negative message will be given silently." Dianne McDonald not been a successful principal at her former school, Briargate, a predominately Black school; and, the parents wanted her out because the school was not performing well. Dianne McDonald was placed at the petitioner's school, Blue Ridge, when the principal, Clem Boulte retired. Blue Ridge had a mixture of minority and/or disadvantaged students, poor blacks, poor browns, and poor white. The petitioner had a differing opinion about the

best reading philosophy and strategies that work best to bring about the ultimate success for, particularly poor, and/or disadvantaged children who are most often minority children, Black and/or Brown and who may even by second language speakers in English. The strategies utilized for the petitioner's students brought about fantastic results, but Mrs. McDonald insisted that the petitioner not utilize her strategies. Petitioner tried to reason with Mrs. McDonald by describing student success; "Mrs. McDonald said, 'I don't care about how much success you are having. This is my school and I don't want it!'" Mrs. McDonald begun to harass the petitioner if she thought the petitioner was teaching reading in the manner that brought most success for students. McDonald would follow the petitioner around with a notepad to ensure that the petitioner not use the successful techniques that worked so well with these students. The petitioner's job as teacher specialist was phased out at that school, and based upon the hostile environment, the petitioner felt compelled to transfer from that setting.

The petitioner transferred to Townewest as an English as a Second Language Teacher K-5. The petitioner continued to apply for and was denied continuously the opportunity for administrative advancement positions. The petitioner continued to see countless individuals with less experience, knowledge, and credentials/qualifications promoted over her. In 1996, Vicki Johnston, a younger White female from the Superintendent's Cohort Classes" was promoted to the assistant principal's position that had become vacant at the petitioner's school, Townewest. The petitioner's school Townewest was located in area 3, a White area, of the Fort Bend Ind. Sch. Vicki Johnson was still taking classes and had not completed her administrative coursework; she had no knowledge or experience with ESL-English as a Second Language or children of poverty, yet in 1996, she became

the assistant principal at Townewest. Johnston instigated a rein of tyrannical harassing, retaliatory, disparate treatment in constant search of impropriety in the petitioner's instructional management of the ESL/English as a Second Language Program that **was already successful.** It was a mind boggling experience because Mr. Cecil Tielke, the Principal joined in with Vicki; Mr. Tielke had never treated the petitioner in a singling out disrespectful/disparate manner as if he did not trust the petitioner's professionalism, or instructional judgment, or how the petitioner scheduled students in the ESL Program based upon their language instructional needs. Vicki brought a bullying-type-disrespectful management style to Townewest and the petitioner was singled out for intense scrutiny, disparate, and harsher treatment. Vicki began purporting, disparately and without merit in memorandum format that the petitioner was abusing sick and personal business days, being tardy in excess of three times, and violating policy concerning reporting absences; Mr. Tielke supported Vicki Johnston in her accusation even though prior to Vicki coming to Townewest, Mr. Tielke had never engaged in this type of disparate treatment without merit toward the petitioner. Mr. Tielke, himself, seemed fearful of Vicki Johnston. Moreover, in a bullying style, Vicki even accosted the petitioner in the library the day before the Thanksgiving holiday was to begin; Vicki Johnston stood over the petitioner, and boomed out in a loud, disrespectful voice. Mrs. Hill, "Why aren't you servicing you students?" The regular classroom teacher had requested that the petitioner not come to her class on that day because the third grade classes were having their traditional harvest feast with parents as invited guests so the petitioner used that time in the library working on her lesson plans and gathering books to be used for upcoming lessons. There were other teachers who were also teacher specilist who wre doing likewise as the petitioner, but they were not singled out and

treated in the sane manner as untrustworthy, and needing to be checked upon, and being talked to in a disrespectful, demeaning manner as was the petitioner. Soon after, Mr. Tielke stepped down as principal and took an assistant principal's job at another school. Vicki Johnston became principal and hired 26 year-old Dedrick Martin, African American, as her assistant principal in 1999; he was from the Superintendent's Cohort Classes, and, he too, had not completed his administrative coursework or his Master's degree. He had no regular teaching experience; his experience had only been in special education, and he had barely completed a little over 2 years of teaching. Vicki made a direct statement to team leaders that she fired Martin because he was "moldable" The petitioner, in considering Mr. Martin's **very young age concluded, moldable equated an age preference remark made by Vicki Johnston.**

The petitioner filed an EEOC Complaint in January 1999; the EEOC complaint was certified in April 1999. After the Petitioner filed an EEOC Complaint, she filed her lawsuit in district court, and within a few days before the petitioner was due to go to before a judge in federal district court to obtain the scheduling order from the judge, the petitioner was subjected to a "disciplinary counseling session," followed by a written reprimand accusing her without merit of not properly serving students in her ESL/English as a Second Language class by Mr. Martin who gave the petitioner a lowered evaluation in a particular area to indicate **without merit** that the petitioner did not get along with her fellow coworkers on the job, and he wrote additional negative comments on the petitioner's evaluation. In the 30 years that the petitioner had taught, she had never received an evaluation lowered in any section or area and written reprimand purporting and accusing her of professional irresponsibility or professional impropriety. The pretext

reason that the courts below have accepted as a legitimate nondiscriminatory reason for why the respondent failed/refused to promote the petitioner is not documented on any of the petitioner evaluations throughout the years **with the exception** of Mr. Martin's without merit lowered evaluation that occurred **after the petitioner engaged in protected activity.**

The Court of Appeals conceded that the petitioner met her burden on all four prongs for having made a prima facie case on race and age as determined by the McDonnell Douglas Test, but discrimination claims on retaliation and harassing hostile work environment were denied, and the embedded gender issue was not addressed at all. The excluding and ignoring of the petitioner's direct and circumstantial evidence in the record by the courts below and by their not viewing the record as dictate by Rule 50 in the light most favorable to the nonmoving party; and by their additional credence to what they believe to be a nondiscriminatory explanation for the respondent's failure/refusal to promote the petitioner, the United States Court of Appeals for the Fifth Circuit affirmed the district's court summary judgment against the petitioner.

REASONS FOR GRANTING THE PETITION

The first reason **this Court should grant this petition is** because the courts below erred by excluding the petitioner's Title VII discrimination claims prior to June 10, 1998. Before a suit may be filed under Title VII, a plaintiff must file a complaint to the EEOC within 180 or 300 days. See U.S.C. s 200e-5(e)(1). Title VII"s limitation period liability to conduct occurring within the applicable limitations period; the continuing violations doctrine, however, allows courts to consider conduct that would ordinarily be time barred "as long as the untimely incidents represent an ongoing unlawful

employment practice." Anderson v. Reno, 190 F.3d 930, 936 (9th Cir. 1999); see e.g.. Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1107 (9th Cir. 1998). The Ninth Circuit has never adopted a strict notice requirement as the litmus test for application of the continuing violation doctrine; in fact, in Fiedler v. UAL Corp., 218 F.3d 973 (9th Cir. 2000), according to Fielder, a plaintiff can establish a continuing violation in one of two ways. First, by showing a series of related acts one or more of which are within the limitations period – a serial violation. A serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. The second way to establish a continuing violation is to show a systematic policy, or practice of discrimination that operated, in part, within the limitations period – a systemic violation. Systemic or practice" and most often occur in matters of placement or promotion (repeated denial of a promotion). The petitioner's Title VII claims repeated failure to promote, retaliation, harassing hostile environment via disparate treatment were actionable as continuing violations determined by both serial and systematic type continuing violation; the courts below erred by misapplying a legal standard too rigorous to determine the Plaintiff's claims prior to June10, 1998 equating the occurrence of the Continuing Violation Doctrine exhibited by the respondent's continuing failure/refusal to promote the petitioner not only as an adverse personnel action but also as a simultaneous, "embedded" act of retaliation. The respondent, even admitted, in its initial Response statement to the EEOC, "Mrs. Hill has been told that she has an intimidating personality, and the Fort Bend Ind. Sch. Dist. Cannot promote persons who have intimidating personalities." This direct statement in the record is the causal link to the retaliation for the continuous, retaliatory, refusal/failure to promote the petitioner prior

to June 10, 1998 continuing on into the charge filed period.

The second reason, this Court should grant this petition is because both the respondent's EEOC Response and also what the courts below have determined to be a nondiscriminatory explanation on the part of the respondent as to why it has continuously refused/failed signals pretext, retaliation, and an embedded issue of gender, which is racially tainted and racially codes/profiles and stereotypically and subjectively assigns a difficult, hard to get along with "intimidating personality type," particularly, to an African American female who is self assured, competent, astute, verbally articulate, and who carries herself with a certain dignity, seriousness, no nonsense manner, and seeks answers to questions via verbal or written content that are either undemocratic, unethical, or illegal, and/or not in the best interest of her life's work/profession or the job or task to which she ahs been assigned or endeavors to do. This sinister dual-twin issue embedded within the gender issue, as a whole, is one which is grossly missed and overlooked in the courts regarding a Black female in the workplace; she runs a double risk of the possibility of suffering discrimination and/or having discrimination perpetuated upon her due to gender by males of any race or color, and, yes, even, by **other females** who are non-Black which tends to be racially tainted accompanied by a lack of trust and misunderstanding due to a type of cultural dissonance. Going one step farther into a sensitive area, in plain English, carrying over from the days of slavery, if a "Black person" appeared too confident, too self-assured, too well spoken, too educated, they were viewed with distrust and distaste as "Uppity" "Putting on airs" and thinking that they were equal with White folks, and not knowing their places. Even, other Blacks would caution and remind this so called "Uppity Black person" about appearing too uppity and not knowing their places. So does the petitioner really have

an intimidating personality, or is she difficult to get along with, or does she really have poor interpersonal skills? This issue has to be scaffolded by the Fourteenth Amendment to the Constitution and equal protection, and due process, therein, and the pursuit of liberty for the petitioner to live her life and be who she is without fear of being continuously punished and deprived of a promotion for appearing too uppity and thinking she is equal to White Folks. This embedded issue without the generalized gender issue of Title VII is very complex; and, Title VII does not adequately address the "Black female's gender issue within the holistic gender issue" under Title VII.

The third reason this court should grant this petition is because the Court of Appeals erred in its analysis fo the record in recognizing direct and circumstantial evidence as matters for the jury and by misapplying incorrect legal standards. While ackowledging that the record reflected a prima facie on race and age; and, also while acknowledging via affidavits given by the petitioner's coworkers that the petitioner was a good teacher and brought out the best in her students, particularly, in the area reading; the Court of Appeals, failed to discern and/or either ignored the incongruency of the direct evidence exhibited by the direct statements made by the petitioner's co-workers in their affidavits disputed the circumstantial evidence presented via affidavits by the **same individuals (persons who were White and/or Black male who was younger than the petitioner by 24 or 25 years who had been promoted over the petitioner from the Cohort Classes with less experience, less education/qualifications, less experience, and no proven background of having the ability to bring out the best in students and were now her supervisors)** who were subjects of the petitioner's discrimination complaints. This created circumstantial evidence and on its face was sufficient

evidence to undermine the discriminatory explanation offered by the respondent. Yet, still, and simultaneously, the courts below ignored and/or excluded direct evidence and circumstantial evidence in the record which raised disputes/jury issues regarding the respondent had continuously failed/refused to promote the petitioner. Additionally, in doing so, the courts below demonstrated that they were inappropriately viewing/weighing evidence more favorable to the moving party than to the non-moving party as dictated by Federal Rule of Civil Procedure 50, which also mirrors Federal Rule of Civil Procedure 56. Reeves v. Sanderson Plumbing Prods. Inc. 530 U.S. 133, 150 (2000) Blow v. San Antonio, 236 F.3d 930, 936 (5th Cir. 2001).

The fourth reason this Court should grant this petition is because the direct evidence in the record, which was excluded or ignored by the courts below was not evaluated by the correct legal standard. The petitioner's own affidavit precluded summary judgment because it presented a genuine issue of material fact of the discrimination claims outline in her discrimination complaint. The petitioner's affidavit which included **"quoted direct statements" exemplifying the discrimination suffered; and, this was enough/sufficient, in the context of Title VII, on its face to raise jury issues. The petitioner's affidavit** should not have been considered as "subjective beliefs". "In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face. Portis v. First Nat'l, 34 F.ed 325, 328, 329 (5th Cir. 1994) 34 F.3d at 329. McDonnell Douglas should have been by passed, in the instance of direct evidence presented a factual issue for the jury; McDonnell Douglas Test inappropriate standard for determining direct evidence. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("McDonnell Douglas Test is inapplicable where the plaintiff presents direct

evidence of discrimination."); Portis, 34 F.3d at 328 (same); both are cited in Fierros v. Texas Department of Health (5th Cir. 2001).

The fifth reason this Court should grant this petition is because in examining the petitioner's retaliation claims and hostile work environment, the courts below erred by not applying the proper legal standard congruent to causation; and, even, if assuming that the petitioner had presented only circumstantial evidence and thus the McDonnell Douglas framework applied, petitioner would have still raised a factual issue precluding summary judgment. Thus, based upon the aforementioned, gives cause for this Court should grant the petitioner's request for a Petition is because the courts below abused their discretion by disregarding a prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, permitted the courts below to not concluded that the respondent unlawfully discriminated.

This sixth reason this Court should grant this petition is because of the many **unresolved issues raising jury questions** in this Title VII case regarding the following: **Disparate** impact created by the respondent's practice of **au jus segregation, "special treatment"** in the essence of a particular employment **"pattern practice"** giving favoring opportunity to one group and foreclosing opportunity for another group" emerging as in the example of the escalated hiring/promotional opportunity for applicant in the Superintendent's' Cohort classes. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) citings Griggs v. Duke Power and Teamster v. United States, 431 U.S. 324 (1977). **And, also, last but not least the document, which misrepresents ethnic/racial balance of administrative positions in which, the court of appeals referred to as "compelling statistical evidence."** The courts below abused their discretion

concerning the aforementioned disputes; it was impermissible for these disputes suppressed n this Title VII case by not allowing them to go forward to the jury. Even if race and/or age would be a proportionate representation in the Fort Bend Ind. Sch. Dist. It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workplace. Albermarle Paper Co. v. Moody Evidence that the work force was racially balance while not wholly irrelevant, "was not" to conclusively demonstrate that (the employer's actions were not discriminatorily motivated"); this petition, particularly needs to be granted because in concluding that these circumstances so overwhelmed the evidence-favoring petitioner that no rational trier of fact could have found that the petitioner was not promoted because of her race and age as well as retaliation, the Court of Appeals for the Fifth Circuit impermissibly substituted its judgment concerning the weight of the evidence for the jury's. Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133, 150(2000).

The seventh reason this Court should grant this petition is because the Court of Appeals for the Fifth Circuit applied contradictive legal rulings in conflict with its own court, other United States Court of Appeals, and the Supreme Court. The Courts of Appeals applied legal rulings which conflicted with, in reviewing the record, the light most favorable to the nonmoving party as dictated by Rule 50 which mirrors Rules 56 in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) and Blow v. San Antonio, 236 F.3d (5th Circ. 2001). The Court of Appeals made legal ruling in conflict with Furnco Construction Corp., v. Waters, 438 U.S. 567 (1978) as cited in Reeves v. Sanderson Plumbing Prod. Inc. 530 U.S. 133, 150(2000) when concluding that the

appearance of statistical data depicting racial balance in promotions so overwhelmed the evidence favoring the petitioner that no rational trier of fact could have found that the petitioner was not promoted because of her race and age; the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's. The Court of Appeals made legal rulings, which conflicted with decisions made by its own court in discerning causal link to retaliation as in Evans v. City of Houston and "but for" retaliation as in Long v. Eastfield Coll., 88 F.3d 300, 304 5th Cir. 1995). The Court of Appeals made legal rulings in conflict with decisions in its own court's cases as in Portis v. First Nat'l, 34 F.3d 325, 328 (5th Cir. 1994) for determining what constitutes direct evidence; petitioner's affidavit alone in the record precluded summary judgment because it presented a genuine issue of material fact as decided in Vance v. Union Planters Corp., 209 f.d 438, 442 (5th Cir. 2000);p this decision conflicted with legal rulings concerning the petitioner's evidence (affidavit of petitioner) in the record concerning Rule 50; even if a Title VII plaintiff was the sole witness to offer testimony about discriminatory employer's statements, it would warrant taking the case to the jury. The Court of Appeals made legal rulings in conflict with decisions in its own court in reviewing the record in the light most favorable to the nonmoving party's evidence is in conflict with Fierros v. Texas Department of Health (5th Cir. 2001) and Evans v. City of Bishop, 238 F.3d 586, 589 (5th Cir. 2000). The Court of Appeals made legal ruling in conflict with other court of appeals for determining the continuing violation doctrine as in Morgan v. National Railroad Passenger Corporation 99-15374 (9th Cir. 2000); Draper v. Coeur Rochester, Inc. 147 F.3d 1104, 117 (9th Cir.); Fielder v. UAL Corp., 218F.3d 973 (9th Cir. 2000) petition for cert. pending No. 00-1397 (filed Mar. 7, 2001). The Court of Appeals made legal ruling which conflict with the Supreme

Court and the United States Court of Appeals for the Ninth Circuit in determining a harassing, hostile work via disparate treatment conflicting with Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Morgan v. National Railroad Passenger Corporation 99-15374 (9th Cir. 2000).

The eight reason this Court should grant a petition is because the courts below abused their discretion by allowing the respondent to violate Civil Rule of Procedure 37 which impeded/suppressed the petitioner's opportunity to make a comparative analysis of her credentials with those persons promoted over her to exhibit the disparity of the credentials of those person who received the promoted over her.

The ninth reason this Court should grant this petitioner is because the respondents were not entitled to a summary judgment and keeping this case Title VII out of the hands of a Jury; neither are the respondents entitled any money from the petitioner. This is not a frivolous lawsuit! The courts below abused their discretion by rendering a summary judgment in favor of the respondent and ordering court cost to be paid by petitioner when there were no briefs filed at the district court level because the case never went to a jury. The petitioner did pay $100.00 to the respondent for the cost of filing briefs in the Court of Appeals. The district court level below ordered that the petitioner pay $1,752.41 for the cost of the respondent deposing the petitioner. Since there was no actual court cost at the district court level because the case never went to the jury, the respondent should bear their own cost. The final reason this Court should grant this petition is because of the public issue at stake: How is it that a experienced, competent, qualified teacher who brings out the best in students cannot receive a promotion in a public educational institution which has the public's trust and who

has purported to the public the commitment to hire and promote persons who have demonstrated excellent results in their capability to educate the public's children in an excellent manner for the benefit of its children, yet, the petitioner was continuously deprived of obtaining an opportunity to be promoted and become a leader in the business of public education in her own place of employment where she has impacted favorably and made a significant contribution to the commitment, goals, ideals, and the public trust enjoyed by the Fort Bend Ind. Sch. Dist. The petitioner exhibited excellent job performance in meeting her commitment to the public by educating the public's children to bring out the best in them to become literate, competent students themselves, their families, their communities, the State, The United States of America, and the World. But yet, less experienced, less qualified, and persons with no proven track record for bringing out the best in the public's children are continuously promoted over her. It is so incredulous that the Fort Bend Ind. Sch. Dist. Would offer up subjective statements that the petitioner, "was not the most qualified person on the job" which on its face is a nonsensical statement which is simultaneously anti-educational. Since when did it become unfashionable for experience to matter or the ability to do the job well insignificant? Well, this exact sentiment is reflected in the following statement offered by the respondent------ "Just because a person has been teaching a long time and has experience doesn't mean they are the best candidate to be promoted" or that the petitioner "has poor interpersonal skills;" anyone who knows anything about children are adept determines of interpersonal skills; and, if the petitioner **truly** had poor interpersonal skills, she would be unable to achieve bringing out the best in her students. Therefore, the courts below erred in their acceptance that the respondent had given a legitimate nondiscriminatory explanation as to why they continued to refuse/failed to promote the petitioner; and in

doing so, the courts below denied the petitioner an opportunity for a jury trial in her Title VII case. In the words, of Thomas Jefferson, "The anchor of all our liberties is a jury trial." To be denied a jury trial in this case is indeed a public concern. For the respondent to say that the petitioner has a difficult personality and make an anti-educational statement in subjectively that the Petitioner was not the most qualified for the job in spite of her excellent job performance, but she has continued not to be promoted is indeed a public concern.

Conclusion

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Cheryl E. Hill
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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-20297
Summary Calendar

Cheryl E. Hill

Plaintiff-Appellant

Versus

Fort Bend Independent School District,

Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Texas
(H - 99 - CV - 3961)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.
PER CURIAM: *

Plaintiff, Cheryl Hill, has asserted claims of race and age discrimination against the Defendant, Fort Bend Independent School District, (hereinafter referred to as "FBISD" or the "District") because of the District's failure to promote her to various administrative positions on numerous occasions. On appeal, Hill contends that the district court erred in granting summary judgment against her on each of her claims. For the following reasons, we AFFIRM the judgment of the district court.

I

Background Facts

Plaintiff Hill is a 53 year old black female who has worked as a teacher since 1970. In 1989, Hill began teaching in the FBISD. In 1994, she commenced an English as a Second Language ("ESL") teaching position at Townewest Elementary School in the District.

Hill alleges in this lawsuit that, since 1988, FBISD has denied her promotions to approximately twenty administrative positions because of her race and/or age in violation of both Title VII and the ADEA. Hill also contends that the District subjected her to a hostile working environment during her tenure as an ESL teacher, and unlawfully retaliated against her for filing an EEOC charge.

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* Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th, CIR. R. 47.5.4.

II

Standard of Review

We review a district court's decision to grant summary judgment de novo, applying the standard set forth in Federal Rule of Civil Procedure 56. See *Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000). Thus, we view all evidence in the light most favorable to the party opposing the motion and draw all reasonable inferences in the party's favor. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000).

III

Analysis

1. Continuing Violation Doctrine

Plaintiff contends that the district court erred in finding that her nonpromotion claims prior to June 10, 1998 are time-barred due to her failure to file an EEOC charge within the required 300 day period. We disagree.

A jurisdictional prerequisite to filing suit under both Title VII and the ADEA is that a plaintiff must file a charge of discrimination with the EEOC within three hundred days after learning of the alleged discriminatory conduct. See *Griffin v. City of Dallas*, 26 F.3d 610, 612 (5th Cir. 1994); Conway *v. Control Data Corp.*, 955 F.2d 358, 362 & n.3. However, the Fifth Circuit has recognized the continuing violation doctrine as an equitable to the statutory limitations period. See *Huckaby v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998).

In *Huckaby*, the Court noted that, "[a]lthough there is no definitive standard for what constitutes a continuing violation, the plaintiff must demonstrate more than series of discriminatory acts. He must show an organized scheme leading to and including a present violation, such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, which gives rise to the cause of action." Id. at 239. Applying this language to the case before it, the *Huckaby* Court found that the employer's failure to promote the plaintiff was an isolated occurrence which should have put the plaintiff on notice that a claim had accrued. Id. at 240. As such, the plaintiff's claims concerning his failure to be promoted were time-barred. Id. In light of *Huckaby*, we find that Hill's claims regarding her lack of promotions prior to June 10, 1998 are similarly time-barred.

2. Race and Age Discrimination Claims

Hill's claims for racial and age discrimination which are not time-barred are governed by the tripartite burden-shifting test established by *McDonnel Douglas v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this test, if Hill establishes a prima facie case of discrimination, the burden of production shifts to the District to articulate a legitimate, non-discriminatory reason for not selecting Hill. If the District satisfies this burden of production, Hill must prove that the legitimate reason offered by the District for not selecting her is not the true reason, but is merely a pretext for unlawful discrimination. See *Lindsey v. Prive Corp.*, 987 F.2d 324, 326 (5th Cir. 1993).

In order to establish the prima facie case of her Title VII failure to promote claim, Hill must demonstrate that she was: (1) within a protected class; (2) qualified for the positions sought; (3) not promoted; and (4) the positions she sought

were filled by someone outside the protected class. See *Blow v. City of San Antonio, Texas,* 236 F.3d 293, 296 (5th Cir. 2001). Hill must also satisfy these four elements to establish her prima facie case for her ADEA claim. See *Evans v. City of Houston,* 246 F.3d 344, 348 (5th Cir. 2001).

In the instant case, Hill has satisfied the four prongs of the prima facie case for both her race and age discrimination claims. It is apparent that the first and third prongs satisfied. With respect to the second prongs, the parties do not dispute that Hill had the general, minimal qualifications for many of the administrative positions sought. With respect to the fourth prongs, it is true that some of the administrative positions were filled by black applicants, and applicants over the age of forty. However, since various positions were filled by individuals outside the protected classes, the fourth prongs of both claims are also satisfied. See *Rios v. Rossotti,* 252 F.3d 375, 378 (5th Cir. 2001).

The District has also met its burden of producing a non-discriminatory reason for failing to promote Hill on each of the relevant occasions. Specifically, the District has articulated that Hill has not been promoted because she was never as qualified as the various candidates selected. However, Hill has failed to produce enough evidence to raise a material issue of fact concerning her contention that the District's explanation for failing to promote her is pretextual for the following reasons.

First, there is absolutely no evidence that Hill was subjected to discriminatory racial or age-related remarks. Second, Hill has not produced any evidence which would demonstrate that she was more qualified that the applicants selected for the various administrative positions. Indeed, there is a dearth of evidence concerning the qualifications and

abilities of the applicants hired to fill the positions sought by Hill. Without comparative evidence of a gross disparity between Hill's qualifications and those of the successful applicants, it is exceedingly difficult to rebut the District's assertion that Hill was not promoted because she was not the most qualified individual. See *Deines v. Texas Department of Protective and Regulatory Services,* 164 F.3d 277, 280 (5th Cir. 1999).

Third, and, perhaps of most importance, the evidence shows that many minority employees and employees over age 40 were actually hired to fill the positions that Hill sought. For example, Hill applied for an assistant principal position for the summer 1999 term and 1999-2000 school year. She was not hired for any of these positions. However, the District filled the four regular term elementary school assistant principal positions available for the 1999-2000 school year with a white individual, age 43, a black individual, age 26, a Hispanic individual, age 35, and a black individual, age 49. Of the individuals chosen as summer school principals and assistant principals for the summer 1999, four were white and three were black. Moreover, out of the approximately twenty-one positions in which Hill applied but did not garner a promotion, fifteen positions were filled by persons over the age of 40; nine positions were filled by whites, nine positions were filled by blacks; and three positions were filled by Hispanics. This numerical evidence tends to negate the inference that individuals were not being hired because of their race or age.

Fourth, attached to her summary judgment motion, Hill produced affidavits from several of her fellow teachers which praised her ability to teach reading. These affidavits tended to show that Hill was a good teacher who brought out the best

in her students. In fact, Hill contends that because she has been a successful teacher for many years, she is better qualified for a promotion to an administrative position that younger, less experienced educators.

However, the District argues that making decision upon the best applicant involves more than merely finding the person who has worked more years as a teacher. According to the District, there are a multitude of factors which are taken into account in the hiring decisions for administrative positions. These include an applicant's academic or technical preparation, certification, experience as it relates to the vacancy, recommendations and references, evaluations, suitability for the positions, and the ability to interact with others.

At the summary judgment stage, the District introduced certain affidavits from Hill's supervisors which indicated that, despite her teaching abilities, Hill has certain personal characteristics which impede her ability to work well with others. Hill's alleged interpersonal relationship weaknesses, in combination with the fact that many black applicants as well as many individuals over the age of forty have successfully attained promotions similar to the ones sought after by Hill, severely undermine her contention that the District's stated reason for failure to promote her is a pretext for unlawful race and/or age discrimination.

In sum, Hill's prima facie case is weak, the probative value of her proof of pretext is low, and the District's statistical evidence is compelling. In the instant case, these factors negate any inference of racial and/or age discrimination. See *Reeves,* 120 S.Ct. at 2109. Therefore, Plaintiff failed to create a jury issue on whether the District's

proffered reason for failing to promote her was a pretext for discrimination.

3. Hostile Working Environment Claim

The district court also did not err in dismissing Hill's hostile work environment claim. Although Hill makes several unsubstantiated allegations of general harassment, the crux of Hill's hostile working environment claim is that her supervisors constantly requested her schedules and asked her questions about the ESL program. We concur with the district court's determination that these types of complaints do not demonstrate that Hill has been subjected to racial or age-based harassment that is sufficiently sever or pervasive to alter the terms and conditions of her employment and create an abusive working environment. See *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986).

4. Retaliation Claims

With respect to Hill's retaliation claims, we concur with the District Court's assessment that any alleged retaliation claims that occurred prior to May 30, 1999 are time-barred. Furthermore, the record reflects that Plaintiff failed to demonstrate a causal connection between her filing of the April 5, 1999 EEOC charge and any adverse employment action.

5. State Law Claims

Finally, Hill contends that her slander/defamation claims should not have been dismissed by the district court. Her contention is without merit. An independent school district is an agency of the state and, while exercising governmental functions, is not answerable in a suit sounding in tort because of sovereign immunity. See *Barr v. Bernhard,* 562 S. W.2d 844 (Tex. 1978). Although the Texas Tort Claims Act

waives sovereign immunity under certain circumstances, the waiver of immunity for school districts is limited to claims arising from accidents involving the use of motor-driven vehicles. See *LeLeaux v. Hamshire Fannet Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992).

IV.

Conclusion

For the preceding reasons, the grant of summary judgment in favor of the District on each of Plaintiff's claims is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHERYL HILL,	§	
	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-99-3961
FORT BEND	§	
INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Defendant	§	

FINAL SUMMARY JUDGMENT

Pursuant to the memorandum and order signed on this day, the Court

ORDERS that FINAL SUMMARY JUDGMENT is GRANTED on all claims in the above referenced action in favor of Defendant the Fort Bend Independent School District ("the District") against prose Plaintiff Cheryl Hill. Plaintiff shall take nothing and shall bear costs of courts.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas this 19th date of February, 2001.

/s/ Melinda Harmon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHERYL HILL,	§	
	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-99-3961
FORT BEND	§	
INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Defendant		

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action, alleging employment discrimination based on race (black) and age (currently fifty-three) in the denial of numerous promotions, hostile work environment, and retaliation, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 621 et seg., and of the Age Discrimination in Employment Act ("ADEA"). as amended, 29 U.S.C. §§ 624 et seg., and state law claims of defamation and slander, are Defendant the Fort Bend Independent School District's ("the District's") motion for summary judgment (instrument #52) and motion to strike pro se Plaintiff Cheryl Hill's summary judgment evidence (#61).

In her second amended complaint (#16) and deposition, Plaintiff, a teacher since 1970, was employed by the District since 1989. Initially she taught second grade at the District"

Ridgegate Elementary. In 1990 she applied for and was hired as an instructional specialist at Blue Ridge Elementary. In 1994 she was transferred to Townewest Elementary School to teach English as a Second Language ("ESL"). Plaintiff alleges that from the year before she was hired by the District, when she worked for Lamar Consolidated Independent School District, Defendant has continually refused at first to hire her and then denied her promotions to a number of "administrative positions or advancement positions," [1] has created a hostile work environment, and, since 1994, has retaliated against her with harassment [2] and continual refusals to promote her because she wrote letters of complaint to administrators in the District, filed two charges (April 5, 1999 and March 20, 2000) [3] with the Equal Opportunity Commission.

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[1] Plaintiff received a mid-management administrator certification from the Texas Education Agency in May 1987.

Specifically, she complains that she was denied promotion more than once to such positions as Assistant Principal, English as a Second Language Coordinator, Title I Supervisor, Dean of Instruction, and Reading Specialist.

The District presents evidence that during her deposition, Plaintiff stated that she has been denied at least twenty administrative positions because of her race and/or age. Dep. At 84, Def.'s Ex. A. Plaintiff prepared a summary (Ex. 14) of the administrative positions she claims she applied for in the District since 1992, which Defendant included in its summary judgment evidence and which the Court has used in evaluating Defendant's summary judgment motion.

[2] During her deposition (excerpts attached to Plaintiff's response to motion for summary judgment), Plaintiff identified as instances of retaliatory harassment, other than the denial of promotions, the following: (1) reprimand on March 10, 2000 from assistant principal Dedrick Martin for not giving sufficient ESL time to some students; (2) two letters from principal Cecil Tielke and assistant principal Vicki Johnston, dated February 25, 1997 and March 10, 2000, criticizing her ESL scheduling; (3) a "bad" evaluation because she should have had more "Exceeds" and

("EEOC"), and instituted the instant lawsuit on November 15, 1999. She also asserts a state common-law claim if slander/defamation.

Defendant moves for summary judgment on the following grounds: (1) Some of Plaintiff's claims are precluded because she failed to exhaust administrative remedies or they are tine-barred; (2) Plaintiff cannot establish a Title VII or ADEA violation because she cannot show that she was treated differently from any other applicant for the various positions she sought and there is no evidence that her race or age played a role in the District's decision; (3) she fails to show that her work environment was so permeated with racial/age hostility so as to affect the terms and conditions of her employment sufficiently to qualify as a hostile work environment; (4) Plaintiff cannot demonstrate that Defendant's alleged retaliatory acts were causally linked to her EEOC charges or to her filing of the instant action; and (5) her state law claims for defamation or slandered are barred by sovereign immunity.

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(4) a letter of January 1999 from Tiekle regarding her absences; (5) documented criticism from Johnston for lateness 1997 or 1998; and (6) a 1994 letter from Dianne McDonald, principal of Blue Ridge School at the time, expressing a :difference in philosophy" about a reading program Plaintiff was pursuing as an instructional specialist. Dep. At 49-56; 61-65; 73. When asked if she had ever been reprimanded or disciplined, she responded, "I have been harassed." Id. at 65.

[3] The first EEOC charge alleged that Plaintiff had been denied the opportunity for promotion, because of her race and age, since 1988 "and continuing," most recently for the positions of Second Language Coordinator On November 10, 1998 and summer school Assistant Principal on January 25, 1999.

The second charge alleged retaliation based on her earlier EEOC charge and states that she believes she was "being set up for further

With supporting affidavits, the District points out that its application and job interview procedures include posting of promotional opportunities to provide notice of open positions to inside and outside applicants; a review by multi-member committees to eliminate bias that a single reviewer might; selection of candidates for interview based on criteria listed in the announcement; equal opportunity through a structured interview format, with open-ended questions, written in advance and asked of each applicant, with an opportunity for each interviewee to respond and elaborate to convince the committee of his/her suitability for the position; and no opportunity for a single person to control the screening, interview or evaluation of the applicants. The District further maintains that although Plaintiff applied for and met the basic requirements for the positions that she sought, she, along with others, did not get the jobs because she was not the most qualified applicant. It further emphasizes that many successful candidates for the various positions were black and/or were over forty years of age.

The District contends that many of Plaintiff's claims are time-barred because they were not filed within three hundred days of her first, April 5, 1999 EEOC charge.

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disciplinary action" and that the District's retaliatory acts were "an attempt to build a paper trail to possible not renew my contract and damage my credibility and professional good name." On May 8, 2000, Plaintiff filed an amendment asserting that on May 2, 2000, she received "a Lower evaluation, negative comments and refusal of due process in retaliation for filing a lawsuit in Federal District Court," as well as for the filing of the second EEOC charge.

Copies of all three documents are included in Defendants summary judgment evidence. Depo. Ex. 19, Ex. J, Ex. K.

These claims of nonpromotion, which have a permanence that precludes application of the continuing violation theory, go back to June 1, 1988. Rush v. Scott Specialty Gases, Inc. 113 F.3d 476, 483 (3d Cir. 1997); Weeks v. Coury, 951 F. Supp. 1264, 1270 (S.D. Tex. 1996). Thus all nonpromotion claims prior to June 10, 1998 are time-barred.

Second, the District argues that Plaintiff fails to make a prima facie case of discrimination under either Title VII or the ADEA because she cannot show that she was treated any differently than other similarly situated persons who were outside the protected class. She does not allege that she was denied an equal opportunity to apply for any administrative positions in the District or that she was treated differently from any applicant in the selection process. She was interviewed for some of the positions she sought. She concedes that many of the individuals selected for these positions were black and/or over forty years of age. Pl.'s Depo. At 89-90, 97, 98, 102, 116, 126, 133, 143, 144, 148-49, and 154.

Defendant addresses each position that Plaintiff identified in her complaint as having been denied to her.

Four regular term elementary school assistant principal positions were available for the 1999-2000 school year. Ex. E, Saunders Affidavit. Sixteen applicants, not including Plaintiff, were interviewed. The successful candidates by race and age were a white, age 43; a black, age 26; a Hispanic, age 35; and a black, age 49. Id. Although Plaintiff alleged that she also applied for an assistant principal position in April 1998, the claim is time-barred, as indicated above. Even if it were not, Plaintiff concedes that a black person was given the position. Depo. At 128.

The positions of summer school principals and assistant principals for 1999 were announced and applications were received up until January 12, 1999. Ex. D. Hill Affidavit. More than one hundred people applied, and twenty-three were interviewed. Of those twenty-three, ten were white, three were Hispanic, and ten were black. Id. Plaintiff was not selected for an interview. The successful candidates were made up of four whites and three blacks, ages 40, 43, 47, 51, 52, 53, and 55. Id. The school district, moreover, considers these positions temporary assignments and not promotions. Ex. C. Pedraza Affidavit.

For the search in 1998-99 for the single District position of Coordinator of English as a Second Language, fifteen candidates (six whites, ages 23, 24, 34, 43, 48, and 51; two blacks, ages 29 and 51; six Hispanics, ages 28, 40, 42, 46, 51, and 53; and one Asian, 51) applied. Four applicants, not including Plaintiff, were interviewed, and the successful candidate was white, age 43. Id.

Plaintiff applied for the position of Title I Coordinator in 1997, so any claim based on this application is time-barred. If it were not, summary judgment evidence shows that Plaintiff was interviewed for this job and that the successful candidate was black. Depo. At 123, 126. When Plaintiff was asked why she believed this selection was discriminatory, she stated that it was because the position was reposted and "if you post a job and there are person qualified for the job and you continue to seek other applicants, that is discrimination." Depo. At 128. Defendant insists there is no authority to support such an assumption.

Without identifying when, Plaintiff's complaint asserts that she was denied a promotion to the position of Dean of Instruction. At her deposition she presented a list of twenty

positions that she claimed included every job that she was denied since 1992, but it did not include Dean of Instruction., Depo. Ex. 14, Depo at 85. Thus if she did apply for such a position, it was prior to 1992 and any unpaid claims on it are time-barred, urges the District.

Although Plaintiff admits that Reading Specialist positions are not administrative (Depo. At 112, 154), Defendant additionally maintains that they do not support a nonpromotion claim because they do not involve an increase in pay. Depo. At 236. Plaintiff's response to the motion for summary judgment contends they are "promotional opportunities because they enjoy certain/privileges/benefits that the regular classroom teacher does not inclusive of the increased specialized District paid training, increased visible leadership opportunities, " and paid expenses.

In sum, the District maintains that there is no evidence that Plaintiff's race or age played a role in any of the District's decisions not to promote her to an administrative position. Of the twenty-one administrative positions for which she applied, white candidates filled nine, black candidates filled nine, and Hispanics filled three; fifteen were filled by persons over the age of forty. Out of all the positions Plaintiff claims she was denied, as listed in Depo. Ex. 14, the successful candidates were composed of fifteen whites, eleven blacks, one Hispanic, and one Asian. Plaintiff's own exhibit reflects that twelve of them were forty years old or more, twelve were younger than forty, and four were "younger than I." Depo. Ex. 14.

Even if Plaintiff had made a prima facie case of race and/or age discrimination, the District argues that it has provided legitimate, nondiscriminatory reasons for not promoting Plaintiff, which Plaintiff has not shown to be

pretextual. Plaintiff argues that because she has been a successful and respected educator for many years, she is better qualified for a promotion than an educator with less experience or one who is younger. Depo. At 146, 167-68. The District responds that the number of years an applicant has held a particular certificate or degree and the number of years experience are only two of many factors considered. Exs. C, D, and E, Affidavits of Pedraza, Hill, and Saunders. The District also considers an applicant's academic or technical preparation, certification, experience as it relates to the vacancy, recommendations and references, evaluations, suitability for the positions and professional competence and the District's needs. Ex. C. Pedraza Affidavit. One important factor is that administrators and supervisors must be able to work well with a wide variety of people with divergent interests. The District insists that the evidence reflects the Plaintiff's personal characteristics impede her ability to work will with others. Vicki Johnston, the Townewest principal from January 1999 through August 2000, averred that staff members made numerous complaints about Plaintiff's inability to work with them. Ex. G, Johnston Affidavit. The District provides a copy of "an inflammatory e-mail" that Plaintiff sent to all team leaders about an ESL aide. Depo. Ex. 3. Dedrick Martin, a twenty-six-year-old, black male, named assistant principal at Townewest in July 1999, was informed on his first day by Plaintiff that she had much more experience than he did. Ex. H. Martin Affidavit. Martin further indicated that employees regularly complained about Plaintiff's interpersonal skill. Id. The District observed that during her deposition, Plaintiff referred to Martin as "this boy." Depo. at 230. Furthermore, the various selection committees concluded that Plaintiff was not the most qualified candidate for the position for which she applied. Race and/or age was never a factor in the decision-making process. Exs. C, D, E Affidavits of Pedraza, Hill, and

Saunders. Moreover, as the record reflects, numerous blacks and applicants over forty were promoted.

Nor has Plaintiff shown that the District's articulated, non-discriminatory reasons were pretextual and that it was motivated by discriminatory intent. The District contends that Plaintiff has failed to show that there was a nexus between her race and/or age and its denial of a promotion to her. There is no evidence controverting its insistence that she was not promoted because she was not promoted because she was not the most qualified candidate. All that Plaintiff offers is he subjective belief that Defendant discriminated against her based on her race and/or age. She merely speculates about why she was not chosen for the administrative positions for which she applied: "I have all the qualifications, I'm qualified, and I have the experience, so the inference is if – considering all of that, the inference by the preponderance of the evidence is since I am black, since I am over 40, the inference is it has to do with one of those protected categories." Depo. at 150. See also Id. At 162, 196. Plaintiff admitted during her deposition that she had no documentary evidence demonstrating that the District's refusal to promote her was based on her age or race. Depo. at 160.

Defendant further admonishes that this Court at the pretext stage of the evidentiary framework analysis should not engage in a comparison of Plaintiff's qualifications with those of the successful applicants, absent evidence of a gross disparity. Deines v. Texas Department of Protective and Regulatory Services, 164 F.3d 277, 280 (5th Cir. 1999)

Because it is relevant here, the Court observes that in Deines, recognizing that the Fifth Circuit has previously "held that a plaintiff can take his case to a jury with evidence that

he was clearly better qualified than [other] employees who were selected for the position at issue," the Fifth Circuit wrote,

> ...[W]e recognize that the judicial system is not as well suited by training and experience to evaluate qualifications...in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated. Thus, unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.

Id., citing Scott v. Univ. Of Mississippi, 148 F.3d 493, 508 (5th Cir. 1998), EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1445 (5th Cir. 1995), and Odum v. Frank, 3 F.3d 839, 847 (5th Cir. 1993). The appellate court further opined that the colloquial expression "jump off the page and slap us in the face" in essence means:

> that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. This evidentiary standard does not alter the plaintiff's evidentiary burden to prove the fact of intentional

> discrimination by a preponderance of the evidence. Instead, the standard only describes the Character of this particular type of Evidence that will be probative of that ultimate fact.

Id. at 280-281. The District maintains that Plaintiff cannot show such disparity between her qualifications and those of the people selected for the positions at issue.

Nor, insists the District, can Plaintiff demonstrate that she was subjected to a hostile work environment. Instead, she complains only of general harassment. She asserts that unnamed persons in the District have "employed tactics" to "[b]ring Mrs. Hill down professionally," scrutinizing her work, challenging instructional decisions and scheduling, and undermining and discrediting her "professional expertise, knowledge, judgment, and...authority as it relates to...instructional leadership of the English as a Second Language Program..." Plaintiff's Second Amended Complaint at ¶ 6(c) and (d). The District characterizes her allegations as showing that "simply had difficulties working with her supervisors. The primary focus of her complaints is simply a dispute between a supervisor and subordinate over how the specific assigned duties should be performed." Defendant's motion for summary judgment at 20-21. The District contends that Plaintiff cannot demonstrate that the acts she targets were the product of any discriminatory animus. She cannot identify any race or age-related remarks or discriminatory references by any specific individuals. In response to requests at her deposition that she identify acts that made her working environment hostile, she pointed only to a constant request for schedules and constant questions about the ESL program. Depo. at 170-75. When she was

then asked why she believed these requests were based on her age or race, she responded, "I am the only Black ESL teacher at my school." Depo. at 172. She has not shown that she has been subjected to a working environment so permeated with pervasive racial/age hostility as to affect the terms and conditions of her employment. Plaintiff's subjective beliefs alone that she suffered from such discrimination will not support such a claim.

The District, moreover, argues that Plaintiff cannot show that Defendant's alleged retaliatory acts were causally related to Plaintiff's filing of a discrimination charge with the EEOC or her filing of the instant action. The alleged retaliatory conduct by Defendant consists of continuing denial of promotions since 1994, criticism of her reading philosophy in 1992/1994, "employing tactics which exhibit intent and motive ' to bring Mrs. Hill down professionally' by the use of slander/humiliation/disrespect," intense scrutiny of her work, and her "lower" evaluation. Most of these claims are time-barred and are jurisdictionally barred because Plaintiff has not exhausted her administrative remedies regarding them.

On her first EEOC charge of April 5, 1999 (Depo. Ex. 19), Plaintiff did not check the retaliation box and there is nothing in her description of her claim that could be construed as a retaliation claim. In he second charge of March 23, 2000 (Ex. K), she did check the retaliation box and stated that she was retaliated against for filing the first charge. The second charge expressly asserted that Martin counseled her on March 9, 2000, gave her a warning letter on March 9-10, 2000, and presented her with an "unofficial draft ESL matrix" on March 20, 2000. In her May 2, 2000 amendment (Ex. K), she complained of the "lower" evaluation with negative comments. Because an EEOC charge must be filed within

300 days of the alleged unlawful act or the claims is time-barred, all the retaliation claims that occurred prior to May 30, 1999 in the second charge are time-barred. Plaintiff also failed to exhaust her administrative remedies as to all Title VII and ADEA retaliation claims not asserted in the second charge or its amendment.

Furthermore, the District asserts, for any claims that are not time-barred or not administratively exhausted, she cannot establish a prima facie case of retaliation because she cannot show that the protected conduct was a "but for" cause of Defendant's adverse employment action. Most of the actions identified by Plaintiff as retaliatory do not qualify as adverse employment actions or ultimate employment decision under Fifth Circuit law interpreting the statutes. Furthermore, even if she could show that the protected conduct was a "a substantial element" in the District's decision to take an adverse action against her, the employer is not liable for unlawful retaliation where the employer would have taken the same action "even in the absence of the protected conduct." Long v. Eastfield College, 88 F.3d 300, 305 n.4 (5th Cir. 1996). The District contends that Plaintiff cannot show that it would not have taken the challenged actions had Plaintiff not filed the discrimination charges.

Later, the District argues that Plaintiff's state-law claims fail as a matter of law because they are barred by sovereign immunity. While the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001 et seq., waived sovereign immunity to a limited degree, the waiver school districts is restricted to claims arising from accidents involving the operation or use of motor-driven vehicles. Tex. Civ. Prac. & Rem. Code Ann. § 101.051; Leleauax v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992); Williams v. Conroe Indep. Sch. Dist., 809 S.W.2d 954, 957

(Tex. App.—Beaumont 1991, no writ). None of Plaintiff's tort claims relates to use of a motor vehicle.

In response, Plaintiff addresses only two points argued by Defendant. First, she asserts that the limitations bar does not apply because she has alleged a continuing violation in the pattern and Defendant's policy of discriminatory denial of promotion or advancement opportunities. Second she argues that the retaliatory acts are causally related to her actions taken to protect her statutory rights because she wrote letters to the superintendent and to he board members from which the EEOC could reasonably infer that the continues denial of promotions resulted from her internal complaints. Her response is filled with conclusory allegations, and her summary judgment evidence is largely incompetent.

The District has moved to strike Plaintiff's summary judgment evidence because her affidavits are not in correct form, letters are not verified, contain hearsay, are conclusory or matters of opinion, and not based on personal knowledge, the source of her charts is not identified, her letter of reference are not properly authenticated and lack the requisite foundation, as well as are based on opinion and subjective belief rather than personal knowledge and on hearsay, and her resume, teacher certificate and appraisals have not been properly authenticated. The Court agrees with many of Defendant's charges. Nevertheless, in deference to her pro se status, the Court has read the evidence carefully to determine if Plaintiff provides any evidence raising a genuine issue of material fact on her claim where the deficiencies in the admissibility of the evidence could be cured.

The District's reply to Plaintiff's response emphasizes Plaintiff's failure to address many of the District's arguments, misinterprets the law on continuing violations, relies on vague

and sweeping allegations about people in various administrative positions and fails to satisfy her evidentiary burden on the retaliation claims. The District maintains that it has established that Plaintiff did not suffer any adverse employment action because of her age or race, and she has failed to produce any controverting evidence to raise a genuine issue of material fact for trial on her Title VII and ADEA claims. Nor has she offered any evidence demonstrating that she was subjected to a hostile working environment that affected the terms and conditions of her employment. Furthermore, she has not shown that her state-law claims are not barred by the doctrine of sovereign immunity.

The movant seeking a federal summary judgment initially must inform the court of the basis for its motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that it is entitled to a judgment as a matter of law . Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U. S. 317, 323 (1986). The movant need not negate the opposing party's claims nor produce evidence showing an absence factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987).

The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue on material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R. Civ. P.56 (c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. She meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." Id. At 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. Id. At 252.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574. 587-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, she "must do more that simply show that there is some metaphysical doubt as to the material facts." Id. At 586. Instead she must produce evidence upon which a jury could reasonably base a verdict in his favor. Anderson, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id., 477 U.S. at 249-50. Moreover, the non-movant must "go beyond the pleadings and by her own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A., 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions are not competent summary judgment evidence. Grimes v. Texas Dept. of Mental Health and Mental Retardation, 102 F.3d 137, 139-40 (5th Cir. 1996); Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 506 U.S. 825 (1992).

The non-movant cannot discharge her burden by offering vague allegations and legal conclusions. Salis v. Carpenter, 908 F.2d 299, 305 (5th Cir. 1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

Pleadings are not summary judgment evidence. Wallace v. Texas Tech University, 80 F.3d 1042, 1046 (5th Cir. 1996), citing Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (enbanc).

The district court is not required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998), citing Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-16 & n.7 (5th Cir.), cert. denied, 506 U.S. 832 (1992).

The filing of an administrative complaint with the EEOC to allow it an opportunity to investigate discriminatory practices and seek voluntary compliance and conciliation is generally a jurisdictional prerequisite under Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); Patterson v Mclean Credit Union, 491 U.S. 164, 180-81 (1989); Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). Judicial review is restricted to a plaintiff's timely filed EEOC charges or the investigation reasonably expected to grow out of the charges. Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195, 1202 (5th Cir. 1984).

Furthermore, in Texas a plaintiff must file his EEOC charge within three hundred days of the occurrence of the alleged unlawful employment action. Griffin v. City of Dallas, 26 F.3d 610, 612 (5th Cir. 1994). Even though the relevant statute, 42 U.S.C. § 2000e-5 (e) (1), states that the discrimination charge must be filed within 180 days of the

alleged unlawful employment practice, it allows a plaintiff who has instituted proceedings with a state or local agency authorized to grant or seek relief from such practices an extension of the limitations period for filing an EEOC charge to 300 days. Id. The Fifth Circuit has held that "the requirements that person aggrieved must initially institute proceedings with the state referral agency is met by the EEOC's routine transmittal of a copy of the complaint to the state referral agency" pursuant to a worksharing agreement the EEOC and the Texas Commission on Human Rights. Urrutria v. Valero Energy Corp., 841 F.2d 123, 125 (5th Cir. 1998); Id. at 162. The EEOC routinely transmits a copy of a complaint to the Texas Commission on Human Rights, the Texas referral agency, so the default limitations period here, because for this reason Texas is a "deferral state," is three hundred days. Griffin, 26 F.3d at 612-13; Messer v. Meno, 130 F.3d 130, 134 & n.2 (5th Cir. 1997), cert. denied sub nom. Texas Educ. Agency v. Messer, 119 S. Ct. 794 (1994).[4]

Timely filing of a charge with the EEOC is a prerequisite for suit under Title VII. United Airlines, Inc. v. Evans, 431 U.S. 553, 555 n.4 (1977); Abrams v. Baylor College of Medicine, 805 F.2d 528, 532 (5th Cir. 1986). See also Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 476-77 (5th Cir. 1991) ("If an EEOC charge is untimely filed, a suit baesd upon the untimely charge should be dismissed."); Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241, 249 (5th Cir. 1980) ("A past act of discrimination for which a party did not file a charge of discrimination.

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[4] This federal-state cooperation under the Worksharing Agreement does not extend to exhaustion of remedies. The Fifth Circuit recently held that a former employee failed to exhaust his state administrative remedies for a claim under the Texas Commission on Human Rights Act where he received a right to sue letter from the EEOC, but not one from the Texas Commission on Human Rights. Jones v. Grinnell Corp., ___ F.3d ___, 99-10402, 2001 WL 710 (5th Cir. Jan. 4, 2001).

to a discriminatory act that occurred before the enactment of Title VII."). The cause of action for the filing of an EEOC charge accrues on the date the act occurs, not at the time that the plaintiff becomes aware that an act was discriminatory. Delaware State College v. Ricks, 449 U.S. 250, 258 (1980); Merrill v. Southern Methodist Univ., 806 F.2d 600, 605 (5th Cir. 1986).

Thus as a prerequisite to filing suit under Title VII in Texas, a plaintiff must file a charge of discrimination with the EEOC within three hundred days after learning of the alleged illegal discriminatory conduct. 42 U.S.C. § 626 (d) (2) ; Conaway v. Control Data Corp., 955 F.2d 358, 362 & n.3 (5th Cir. 1992), cert. denied, 506 U.S. 864 (1992); Clark v. Resistoflex Co., 854 F.2d 762, 765 (5th Cir. 1988). Once a plaintiff receives a right to sue letter from the EEOC, a final agency action, permitting him ninety days to file suit to safeguard his claim, because he has had adequate notice, he must do so diligently, and equitable tolling does not apply. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984).

An equitable exception to this statutory limitations period, the continuing violation doctrine was recognized by the Fifth Circuit in Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983); Huckaby v. Moore, 142 F.3d 233, 238 (5th Cir. 1998). Under the doctrine, the plaintiff need show more than a series of related acts, one or more of which falls within the limitations period; he must demonstrate "an organized scheme leading to and including that present violation...such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action [citations omitted]." Id. at 238; Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554, 1560-61 (5th Cir. 1985).

> The core idea of the continuing violations theory, however, is that equitable considerations may very well require that the filing periods not begin to run until the facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights. At the same time, the mere perpetuation of the effects of time-barred discrimination does not constitute a violation of Title VII in the absence of independent actionable conduct occuring within the statutory period. Thus a plaintiff can avoid a limitations bar for an event that fails to fall within the statutory period where there is a persisting and continuing system of discriminatory practices in promotion or transfer that produces effects that may not discriminatory except in cumulation over a period of time.

Huckaby, 142 F.3d at 238-39, citing Glass, 752 F.2d at 1560. Factors to be considered include whether "the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation," whether the alleged acts are "recurring...or more in the nature of an isolated work assignment or employment decision," and perhaps most important, whether "the act [has] the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being

dependent on a continuing intent to discriminate." Huckaby, 142 F.3d at 239; Berry, 715 F.2d at 981. In other words, under the continuing violation theory, "equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated." Webb v. Cardiothoracic Surgery Associates of North Texas, P.A., 139 F.3d 532, 537 (5th Cir. 1998). Demotions, suspensions, discharges, failures to promote and other adverse actions that had material and obvious effect on an individual's employment status are discrete acts to which the continuous violation doctrine does not apply. Huckaby, 142 F.3d at 239. With respect to the Berry/Huckaby permanence factor, the Fifth Circuit has clearly distinguished a denial of promotion from a hostile work environment/continuing violation claim,

> Acts of harassment that create an offensive or hostile environment generally do not have the degree of permanence as, for example, the loss of promotion. If the person harassing a plaintiff leaves the job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff's promotion leaves, the plaintiff is still without a promotion even though there is not longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated.

Waltman v. International Paper Co., 875 F.2d 468, 476 (5th Cir. 1989).

Furthermore, the filing of an administrative complaint with the EEOC to allow it an opportunity to investigate discriminatory practices and seek voluntary compliance and conciliation is generally a jurisdictional prerequisite under Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); Patterson v. Mclean Credit Union, 491 U.S. 164, 180-81 (1989); Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). Judicial review is restricted to a plaintiff's timely filed EEOC charges or the investigation reasonably expected to grow out of the charges. Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195, 1202 (5th Cir. 1984). "In this circuit, a district court may only consider those grounds of a Title VII complaint that were raised in the administrative process." Anderson v. Lewis Rail Service Co., 868 F.2d 774, 774 (5th Cir. 1989).

To prevail on her race and age discrimination claims, Plaintiff must show that she was treated differently from similarly situated individuals because of her race and age. Willingham v. Macon Tele. Publishing Co., 507 F.2d 1084, 1088 (5th Cir. 1975).

If the plaintiff lacks direct evidence of discrimination, plaintiff asserting a claim for a discriminatory failure to promote under Title VII must initially use circumstantial evidence to make a prima facie case by showing by a preponderance of the evidence that (1) she was a member of the protected class, (2) she was qualified for the position sought, (3) that she was not promoted, i.e., suffered an "adverse employment action," [5] and (4) that after the denial of promotion the desired position was filled by the employer with a non-minority person or one under forty. Mcdonnell Douglas Corp. v. Green, 411 U.S. 702, 802 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248,

254 (1981); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 818 (5th Cir. 1982), cert. denied, 459 U.S. 1038 (1982).

Once a plaintiff has made out a prima facie case of employment discrimination, a presumption arises that the employer unlawfully discriminated against the employee and the burden of production (but not the ultimate burden of persuasion, which remains throughout with the plaintiff) shifts to the defendant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). With some admissible evidence that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the reason for the adverse employment action, the defendant employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action it took against the plaintiff which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. Id. at 507. If the defendant succeeds, the presumption of unlawful discrimination raised by the prima facie case disappears and the burden of production shifts back to the plaintiff to prove by a preponderance of the evidence and with a "heightened level of specificity" that the proffered reason is mere text. St Mary's Honor Center, 509 U.S. at 507 (1993); Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995). There must be evidence to show that the employer's reason is not worthy of credence; a mere shadow of a doubt is not sufficient. EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1443-44 (5th Cir. 1995). A unanimous Supreme Court has recently held that a plaintiff's prima facie case combined with sufficient evidence for a reasonable factfinder to reject as pretext the employer's nondiscriminatory reason for its adverse decision may be sufficient to sustain a finding of liability for intentional discrimination without further evidence of intentional discrimination. Reeves v. Sanderson Plumbing Products,

Inc., 530 U.S. 133 (2000); Vadie v. Mississippi State University, 218 F.3d 365, 374 n.23 (5th Cir. 2000), cert. denied, No. 00-806, 2001 WL 32522 (Jan. 16, 2001).

Conclusory allegations, unsubstantiated assertions and subjective beliefs are not sufficient to support a discrimination claim. Grimes v. Texas Department of Mental Health and Mental Retardation, 102 F.3d 137, 139 (5th Cir. 1996); id. at 1448 (holding that an employee's subjective belief of discrimination alone will not warrant judicial relief).

Although initially developed with respect to sexual discrimination, the hostile work environment cause of action applies to any protected class under Title VII, including race. Walker v. Thompson, 214 F.3d 83 (5th Cir. 2000). The language of 42 U.S.C. § 2000e-2 (a) (1), making it "an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." "evinces a congressional intent, 'to strike at the entire spectrum of disparate treatment of men and women' in employment, " which includes requiring people to work in a discriminatory hostile or abusive environment. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64 (1986). See also Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 593 (5th Cir. 1998), rehearsing en banc granted and op. Vacated, Williams v. Wal-Mart Stores, Inc., 169 F.3d 215 (5th Cir. 1999), op. Reinstated on rehearing except for Part IIC on Punitive damages, 182 F.3d 333 (5th Cir. 1999). Noting the wording of § 2000e-2 (a) (1), the United States Supreme Court has clearly stated that the scope of Title VII's prohibition is not limited to "economic" or "tangible employment action" (e.g., a discharge, demotion, undesirable reassignment, or failure to

receive an increase or bonus) discrimination.[6] Faragher v. City of Boca Raton, 118 S. Ct. at 2282 (1998), citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986), and Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75, ___ 118 S.Ct. 998, 1001 (1998). Covering more that "'terms and conditions' of employment in the narrow contractual sense," TitleVII reaches harassment "so severe or pervasive" as to "alter the conditions of [the victim's] employment and create an ebusive working environment.'" Id. Indeed, "Title VII was only meant to bar conduct that is so severe or percasive that it destroys a protected class member's opportunity to succeed in the workplace." Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194 (5th Cir. 1996), cert. denied, 117 S. Ct. 682 (1997).

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5 "Adverse employment actions" have been defined by the Fifth Circuit to include formal reprimands, demotions, discharges, refusals to hire, and refusals to promote. Benningfield v. City of Houston, 157 F.3d 369, 377 (5th Cir. 1998), cert. denied, 526 U.S. 1065 (1999); Pierce v. Texas Dep't of Crim. Justice, Inst. Div., 37 F.3d 1146, 1149 (5th Cir. 1994). "[A] plaintiff's subjective perception that a demotion has occurred is not enough" to constitute an adverse employment decision. Forsyth v. City of Dallas, 91 F.3d 769, 774 (5th Cir. 1996).

6 A tangible employment action" requires an official act of the enterprise, a company act" such as hiring, firing, failing to promote, reassignment with significantly different responsibilites, or a decision causing a significant change in benefits." Burlington Industries, Inc. v. Ellerth, 514 U.S. 742, ___, 118 S. Ct. 2275, 2268-68 (1998).

To demonstrate subjection to a hostile or abusive work environment based on race or age, a plaintiff must demonstrate (1) that she belongs to a protected group, here African American or over forty years of age, (2) that she was subjected to unwelcome harassment, (3) that the harassment was based on race and/or age, (4) that the harassment affected a term, condition, or privilege of her employment, and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995), cert. denied, 116 S. Ct. 367 (1995). The court should examine the totality of the circumstances in determining if an environment is hostile, including the following: the frequency and severity of the discriminatory conduct; whether the conduct was physically threatening or humiliating or merely an offensive utterance; and whether the conduct unreasonably interfered with the employee's work performance. Harris v. Forklift Systems, Inc. 510 U.S. 17, 114 S. Ct. 367, 371 (1993). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive working environment... is beyond Title VII's purview." Id. at 370. To constitute a hostile work environment where there is no "tangible" adverse employment decision, "the workplace must be permeated with 'discriminatory intimidation, ridicule, and insult' that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment." Id., quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986); Indest v. Freeman Decorating Inc., 164 F.3d 258, 264 (5th Cir. 1999), concurring op., 168 F.3d 975 (5th Cir. 1999). To survive summary judgment, Plaintiff must "create a fact on each of the elements of a hostile work environment claim: (1) racially discriminatory intimidation, ridicule and insults that are; (2) sufficiently severe or pervasive that they; (3) alter the conditions of employment; and (4) create an abusive working

environment." Walker, 214 F.3d at 625.

To make out a prima facie case of retaliation under Title VII, 42 U.S.C. § 2000e-3 (a), a plaintiff must demonstrate (1) that she engaged in an activity protected by Title VII, (2) the employer took an adverse employment action against her, and (3) there was casual connection between the protected activity and that adverse reaction. Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1092 (5th Cir. 1995). An employee has engaged in activity protected by Title VII if shse has "opposed any practice made an unlawful employment action" by Title VII or if she has "made a charge, testified, assisted, or participated in any manner of investigation, proceeding, or hearing" under the statute. 42 U.S.C. § 2000e-3 (a).

Summary judgments are appropriate in age discrimination cases where Plaintiff fails to carry her burden of demonstrating discriminatory treatment. See, e.g., Bodenheimer v. PPG Indus., 5 F.3d 955 (5th Cir. 1993); Moore v. Eli Lilly & Co., 990 F.2d 812, 819 (5th Cir.), cert. denied, 114 S. Ct. 467 (1993).

Where there is no direct evidence of age discrimination, the same evidentiary procedure for allocating burdens of proof applies to discrimination claims under the ADEA and under Title VII. Meinecke v. H&R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995); Bodenheimer v. PPG Indus. Inc., 5 F.3d 955, 957 n.4 (5th Cir. 1993). In a suit for age discrimination, the plaintiff must first establish by a preponderance of the evidence a prima facie case of discrimination.[7] If the plaintiff succeeds, the prima facie cases raises a resumption of discrimination. The defendant must then articulate, but need not prove, that the discharge was based on a legitimate, non discriminatory reason for the termination. Defendant is not required to prove that it was actually motivated by these

proffered reasons, nor must it demonstrate an absence of discriminatory motive. If the employer succeeds, the plaintiff must then prove by a preponderance of the evidence that the reasons are pretextual and that the discharge was motivated by intentional age discrimination. In Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (en banc), the Fifth Circuit held that a plaintiff in an ADEA disparate treatment case must offer evidence to rebut each of the employer's articulated reasons for its action. The Fifth Circuit stated that in conjunction with the prima facie case, that rebuttal would often allow a finding of discrimination without additional evidence to avoid summary judgment if the evidence, taken as a whole, created a fact issue about actual motivation and creates a reasonable inference that age was a determinative

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7 To establish a prima facie case of intentional age discrimination, a plaintiff must show that (1) she was discharged; (2) she was qualified for the position; (3) she was within a protected class (over the age of forty) at the time of the discharge; and (4) she was either replaced by someone younger, or otherwise discharged because of her age. Bodenheimer, F.3d at 957. The United States Supreme Court has made clear that, in assuming that the evidentiary burden of McDonnell Douglas, 411 U.S. at 802, applies to an ADEA case, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of a prima facie case under the ADEA. O'Connor v. Consolidated Caterers Corp., 517 U.S. 308, 313 (1996). While only those forty years older are protected by the ADEA, it prohibits age discrimination against them not on the basis of class membership but on age. Thus if one member of the class loses out to another member of the class, that fact is irrelevant as long as the first lost out because of her age. Id. Courts have held that a five-year difference between an employee and her replacement is insufficient as a matter of law to create an inference of discrimination. Cramer v. Intelidata Techs. Corp. No. 97-2775, 1998 WL 911735, at *3 (4th Cir. Dec. 31, 1998); Bush v. Dictaphone Corp., 161 F.3d 363, 368 (6th Cir. 1998). This Court concludes that two years is not a substantial difference justifying an inference of age discrimination.

factor in the adverse employment decision. Id. at 994. Nevertheless if that evidence taken as whole would not allow a jury to infer that the actual reason for the discharge was age discrimination, the employer would not be entitled to summary judgment. Id. For instance, if one of the employer's reason is questionable, that fact may not suffice to cast doubt on the remaining reasons. Id. See also EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1180 (5th Cir. 1996). Although the burden of production shifts, the plaintiff slways retains the ultimate burden of persuasion that there is a nexus between his termination and his age. St. Mary's Honor Center v. Hicks, 113 F.3d 839, 850 (5th Cir. 1993). While age does not have to be the only reason for an adverse employment decision, it must be factor in the employer's decision and have a determinative influence on the outcome. Woodhouse v. Magnolia Hospital, 92 F.3d 248 (5th Cir. 1996).

After reviewing the record and the applicable law, the Court concluded that Defendant's motion for summary judgment should be granted.

First, all claims prior to June 10, 1998, which is three hundred days prior to the filing of Plaintiff's first EEOC charge, are time-barred. The continuing violation theory does not apply to denials of promotions, which are discrete acts with a permanence that should have alerted Plaintiff to act to protect her rights. Huckaby, 142 F.3d at 239.

First, all claims prior to June 10, 1998, which is three hundred days prior to the filing of Plaintiff's first EEOC charge, are time-barred. The continuing violation theory does not apply to denials of promotions, which are discrete acts with a permanence that should have alerted Plaintiff to act to protect her rights. Huckaby, 142 F.3d at 239.

Second, Plaintiff's race and age discrimination claims under Title VII and the ADEA fail because she fails to show that she was treated differently than other similarly situated individuals. Defendant has shown with uncontroverted evidence that quite a number of the successful applicants for promotions that were sought by Plaintiff were black and/or over forty years of age. Although Plaintiff speculates that her age or race must have been responsible for her not getting all the promotions because, in her opinion, she was qualified for the positions because, in her opinion, she was qualified for the positions, she presents no evidence that she was more qualified than any of the successful candidates or that they were less qualified or unqualified. Plaintiff also submits no other evidence that the District's articulated, legitimate, nondiscriminatory reasons for its selections of others were pretextual.

Plaintiff has also failed to raise a genuine issue of material fact relating to her hostile work environment claim. None of the acts that she targets (e.g., constant requests for schedules or questions about the ESL plan or vague, generalized allegations that people have discredited her professional abilities) are sufficient as a matter of law to constitute an abusive environment where racial aor age-related harassment was so severe or pervasive as to destroy her opportunity to succeed in employment with the District. Indeed, she provides no evidence of intimidation, ridicule or insults based on race or age, no less such that were sufficiently severe as to affect a term, condition or privilege of her employment.

With respect to her retaliation claim, she fails to show evidence of any casual connection between her filing of the EEOC charges or this suit and the District's denial of any promotions.

The Court agrees with Defendant that Plaintiff's defamation/slander claim for monetary damages is barred by sovereign immunity.

For the reasons indicated above, the Court

ORDERS that Defendant's motion to strike is DENIED and its motion for summary judgment is GRANTED on all claims.

SIGNED at Houston, Texas, this 19th day of February, 2001.

/s/ Melinda Harmon
United States District Judge

N THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20297

CHERYL HILL

Plaintiff – Appellant

v.

FORT BEND INDEPENDENT
SCHOOL DISTRICT

Defendant – Appellee

Appeal from the United States District Court for the
Southern District of Texas, Houston

(Opinion 09/26/01, 5 Cir., _____, _____ F.3d_____)

Before DEMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court by polled on Rehearing En Banc (Fed.R.App.P. and 5th Cir.R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel ReHearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED.R.APP.P. and 5th Cir.R.35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Robert W. Parker
United States Circuit Judge

REHG – 6a

Supreme Court, U.S.
FILED
JUN 28 2002
CLERK

No. 01-1567

IN THE

Supreme Court of the United States

CHERYL HILL,

Petitioner,

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Fifth Circuit is inconsistent with the decisions of any other circuits or this Court.

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IN THE

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No. 01-1567

CHERYL HILL,

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FORT BEND INDEPENDENT SCHOOL DISTRICT,

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On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court's February 20, 2002, Order granting Respondent's Motion for Summary Judgment is set out in the Petition for Writ of Certiorari at Appendix B. The September 26, 2002, opinion of the Fifth Circuit affirming the District Court's grant of summary judgment, as well as the October 31, 2001, Order of the Circuit Court denying Petitioner's Petition for Rehearing En Banc, are set out in the Petition for Writ of Certiorari at Appendix A and C, respectively.

STATEMENT OF THE CASE

This Statement of the Case is included, as allowed by the Rules of the Supreme Court, because Respondent is dissatisfied with the "facts" as described by the Petitioner. *See* Sup. Ct. R. 24 2. Petitioner's Statement consists of little more than her unsubstantiated allegations and subjective beliefs.

Petitioner Hill, a Black female born in 1947, has worked as a teacher since 1970 and received a mid-management administrator certificate from the Texas Education Agency in 1987. (Vol. 2, Doc. 52, pp. 567-77). In 1989 Hill accepted a teaching position with the Respondent, Fort Bend Independent School District ("FBISD"). (Vol. 2, Doc. 52, p. 573). In 1994 she began teaching English as a Second Language ("ESL") at Townewest Elementary School in FBISD. (Vol. 2, Doc. 52, p. 572).

On April 5, 1999 Hill filed her initial charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that FBISD had been denying her promotions since 1988, because of her race and age.[1] (Vol. 2, Doc. 52, p. 496). Hill alleged specifically, that on November 20, 1998 she was denied an ESL Coordinator position and on January 25, 1999, a summer school assistant principal appointment on account of her race and/or age. (*Id.*).

On December 7, 1999 Hill filed the instant lawsuit against FBISD based on her initial charge. (Vol. 3, Doc. 1). On March 23, 2000, Hill filed a second EEOC charge, alleging she was retaliated against for filing her April 5, 1999 charge. (Vol. 2, Doc. 52, p. 471). These new allegations were incorporated in a Second Amended Complaint filed on March 31, 2000. (Vol. 3, Doc. 16). The second EEOC charge was also amended on May 8, 2000. (Vol. 2, doc. 52, p. 469). On May 12, 2000, Plaintiff filed a *second* Second Amended Complaint. (Vol. 3, Doc. 27).

In her suit, Hill alleges, generally, that since 1988, FBISD has denied her promotions to at least twenty administrative positions because of her race and/or age. (Vol. 3, Doc. 27, p. 245). Specifically, she contends she was not promoted into

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[1] Appellant allegedly began applying for administrative positions within FBISD one year before FBISD hired her as a teacher. (Vol. 2, Doc. 52, p. 574).

the following positions: (1) Assistant Principal, regular term; (2) Assistant Principal, summer school; (3) ESL Coordinator; (4) Title I Supervisor; (5) Dean of Instruction; and (6) Reading Specialist.[2] (Vol. 3, Doc. 27, p. 245). Hill failed to articulate the date she applied for these positions or if she applied for them on more than one occasion. (*Id.*).

Hill has not alleged that she was ever denied an opportunity to apply for an administrative position within FBISD or that she was treated differently than any other applicant during the selection process. (Vol. 3, Doc. 27). Like most applicants, Hill met the basic job requirements set forth in the job postings and it is uncontroverted that she was interviewed for numerous positions for which she applied. (Vol. 3, Doc. 27, pp. 541, 548, 551, 553, 556-57, 558, 560, 563, 564). However, she and many other individuals were eliminated because they were not the most qualified candidates for the positions. (Vol. 2, Doc. 52, pp. 485-87, 489-91). The summary judgment evidence, as discussed by the courts below, showed that the persons selected, for the promotions Hill complains of not receiving, were a widely diverse group, cutting across lines of race, national origin, and age. (Pet. App. A 6a, B 15-17a). The courts below properly concluded that the evidence supported a summary judgment decision in favor of the District.

SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI

This suit presents nothing more than a routine employment discrimination case that is only made distinctive by virtue of the fact that Petitioner represents herself *pro se* and her briefing and arguments are difficult to decipher. Petitioner's

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[2] Hill admits that Reading Specialists are not administrative positions and successful candidates do not receive an increase in pay. (Vol. 2, Doc. 52, pp. 513, 540 and 555).

arguments are largely borne of the fact that she is unfamiliar with the law. The only reason she articulates for granting review, with any amount of clarity, is her reference to conflict between the courts as embodied in Rule 10. This Brief in Opposition will clarify that the cited authorities are consistent with the Fifth Circuit's decision in this case and no reason for granting review exists.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT IS NOT INCONSISTENT WITH THE DECISIONS OF ANY OTHER CIRCUITS OR THIS COURT

A. The Fifth Circuit Applied the Correct Summary Judgment Standard.

Petitioner erroneously asserts that the Fifth Circuit ignored the limitations on its jurisdiction by improperly weighing the evidence as to each of her claims. Applying proper standards, the Fifth Circuit did not impermissibly weigh the evidence. It merely noted that where Hill offered evidence, it did not contradict with that offered by FBISD and did not create a reasonable inference in her favor. (Pet. App. 7-8a, B 40a). In other instances, the circuit court noted that Hill failed to produce any evidence on certain elements of her claims on which she had the burden of proof. (Pet. App. 8a, B 40a). In fact, in deference to Hill's *pro se* status, the court considered any evidence where the deficiencies in the admissibility of the evidence could be cured. (Pet. App. B 24a).

B. The Fifth Circuit Properly Determined That the Continuing Violation Doctrine Does Not Apply to Hill's Discrimination Claims.

The Fifth Circuit properly dismissed Hill's allegations of discrimination occurring more than 300 days before she filed her charges of discrimination. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d)(2). Hill incorrectly argues that the Fifth

Circuit erred when it concluded that her failure to promote claims pre-dating June 10, 1998 and her retaliation claims arising prior to May 30, 1999 are time-barred. In an effort to avoid the mandatory timelines set forth in the statute, Hill contends her failure to promote claims, extending back to 1988, constitute a continuing violation, citing *Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999) and *Fiedler v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000). Appellant grossly misinterprets this equitable exception to the 300-day rule. Although Hill now relies on Ninth Circuit precedent, her claims are still time-barred because the decisions of the Fifth and Ninth Circuits are consistent in this area.

According to the Fifth Circuit, a continuing violation occurs "where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989) (quoting *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 532 (5th Cir. 1986). It requires an "organized scheme leading to and including a present violation such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, which gives rise to the action." *Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998).

Petitioner asserts that the Fifth Circuit's decision concerning application of the continuing violation doctrine is inconsistent with the following Ninth Circuit opinions: *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000); *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000); and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998). (P. Br. p.16). Each of these opinions is easily distinguished from the present case.

In *Morgan*, a black employee brought a Title VII action against his employer based on multiple acts of alleged discriminatory conduct including discipline, counseling, and failures to promote. 232 F.3d at 1016. The court clearly held

that a series of denied promotions would not, in and of themselves, support an application of the continuing violation doctrine. *See id.* The court also determined though, that numerous alleged acts of discrimination coupled with "abundant evidence from other employees and management regarding the racially discriminatory atmosphere" created a relationship between untimely acts and timely ones. *Id.* The court also noted that a consistent pattern of acts perpetrated by the same managers demonstrated that the acts were not discrete or isolated. *Id.*

In contrast to *Morgan*, Hill offers only conclusory statements and subjective beliefs to support her claims. There is no evidence that she was subjected to any racial or age related remarks. The record is devoid of any evidence of a racially charged atmosphere. Additionally, unlike the decision-makers in *Morgan*, Hill offers no evidence that the same individuals were involved in the various promotional decisions.

Fielder and *Draper* are distinguishable from the present case as well. Both *Fielder* and *Draper* involved claims of sexual harassment premised on a hostile work environment theory and included no claim of a failure to promote. *Fielder*, at 976-77; *Draper*, at 1105. As the Ninth Circuit noted in *Draper*, harassment claims are often the result of "a cumulative process rather than a one-time event." 147 F.3d at 1108 (quoting *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1966)). Moreover, the plaintiffs in these cases successfully established a material question of fact as to their claims of discrimination regardless of the limitations period. *Fielder*, at 985; *Draper*, at 1108. Unlike Hill, they also established that a material question of fact existed as to whether the hostile environment continued into the 300-day limitations period. *Fielder,* at 988; *Draper*, at 1108.

C. The Fifth Circuit Properly Dismissed Hill's Claims of Race and Age Discrimination.

Hill argues that the Fifth Circuit improperly applied this Court's holdings concerning the analysis of Title VII cases. Specifically, she alleges the circuit court failed to recognize information she presented as direct evidence and, therefore, somehow wrongly applied the *McDonnell Douglas* framework. (Pet. Br. 14).

The Fifth Circuit employed the correct legal analysis to determine that FBISD was entitled to summary judgment on Hill's claims of age and race discrimination. (Pet. App. A 4a). First, the Fifth Circuit correctly applied the burden-shifting test established in *McDonnel Douglas v. Green*, 411 U.S. 792, 802-04 (1973). (Pet. App. A 4a). Second, the Fifth Circuit properly found that FBISD met its burden of producing evidence of a legitimate nondiscriminatory reason for failing to promote Hill. (Pet. App. A 5a). Third, the Fifth Circuit properly found Hill failed to produce sufficient probative evidence to raise a material question of fact concerning her contention that FBISD's nondiscriminatory explanation for Hill's inability to promote was merely a pretext. (Pet. App. A 5-7a).

The cases relied on by Hill are distinguishable from the instant case because they, in fact, included direct evidence of discrimination: *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 195 (5th Cir. 2001)(recognizing plaintiff's affidavit constituted direct evidence because it alleged that her supervisor told her she had been denied a pay increase because she filed a discrimination complaint against him); *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 (5th Cir. 2000)(finding evidence that supervisor's comments that he preferred a "mature man" for the position was discriminatory on its face); *Portis v. First National Bank of New Albany*, 34 F.3d 325, 328 (5th Cir. 1994)(stating that plaintiff's testimony regarding statements made by her supervisor

indicating his intent to discriminate against her because of her sex was direct evidence); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)(finding that plaintiffs introduced direct evidence that transfer procedures put in place by the employer discriminated against persons based on age).

D. The Fifth Circuit Properly Dismissed Hill's Claim of Hostile Work Environment.

Contrary to Hill's assertions, The Fifth Circuit applied the proper legal analysis in determining that Hill's claim of a hostile work environment could not survive summary judgment. To prevail on a hostile work environment claim, a plaintiff is required to demonstrate that a reasonable person would consider the environment hostile or abusive, such that it effectively alters the conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

The Fifth Circuit found that Hiil's allegations did not, as a matter of law, constitute severe or pervasive conditions sufficient to support a charge of hostile work environment. (Pet. App. A 8a). The courts below properly determined that complaints of constant requests for schedules, questions concerning the program she was teaching, and unsubstantiated allegations of general harassment do not rise to the level of a hostile work environment. *Id.* The totality of these complaints reveal only that Hill disagreed with her supervisors over how specific assigned duties should be performed. *Id.*

E. The Fifth Circuit Properly Dismissed Hill's Claim of Retaliation.

Contrary to Hill's contention, the Fifth Circuit correctly determined that her claims based on alleged retaliation that occurred prior to May 30, 1999 (i.e., more than 300 days prior to the filing of her retaliation charge) are time-barred. (*See* discussion at paragraph I.B., *supra*). Additionally, the

Fifth Circuit properly found no causation supporting her claim of retaliation.

In order to establish causation as to her timely claims, Hill must demonstrate that her opposition to the alleged unlawful activity was, at a minimum, a motivating factor in the action taken by the employer. *See Long v. Eastfield College,* 88 F.3d 300, 304-05 (5th Cir. 1996); *Jack v. Texaco Research Ctr.,* 743 F.2d 1129, 1131 (5th Cir. 1984). After FBISD explained its nondiscriminatory reason for failing to promote Hill, the burden shifted to her to establish that her protected activity was a motivating factor behind FBISD's decision not to promote her. *See Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001). The Fifth Circuit determined that Hill failed to satisfy her burden. (Pet. App. A 8a). She offered no evidence that the alleged retaliatory acts would not have occurred but for her protected activity. *Id.*

Even if these decisions are inconsistent, which they are not, it would still not be a basis for this Court's review. In fact, however, they are entirely consistent. In *Evans*, summary judgment was reversed because the district court erroneously applied the "but for" test at the prima facie stage; here it was correctly applied following a review of the school district's articulated reason for adverse action. 246 F.3d at 354. Similarly in *Long*, the plaintiff offered specific evidence to show pretext; here, Hill did nothing more than disagree with FBISD's explanation while accusing the court of ignoring her evidence. (*See* Pet. Br. 14).

CONCLUSION

For the above reasons, the Court should deny the Petition for Writ of Certiorari.[3]

Respectfully submitted,

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[3] Hill makes other arguments attacking the decision of the courts below, but none even remotely rise to a level suggesting Supreme Court review. By way of example, throughout her Petition, Hill contends that the district court and court of appeals found that her case was frivolous when what actually occurred was merely an award of court costs pursuant to Fed. R. Civ. P. 54(d).